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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

SARAH ELIZABETH SMITH,

Defendant and Appellant.

C056960

(Super. Ct. No. 07F01434)

A jury convicted defendant Sarah Elizabeth Smith of first degree residential burglary. (Pen. Code, § 459.) The trial court suspended a four-year prison term, placed defendant on five years' probation, and ordered her to serve 365 days in jail.

On appeal, defendant contends there is insufficient evidence to support her conviction and the probation condition ordering her to stay away from places where narcotics are present is void for vagueness. We modify the probation order and affirm.

BACKGROUND

In early July 2005, Ernesto Delatorre, his brother Guillermo, and their cousin purchased a home on Marconi Avenue in Sacramento. The living room was to the left of the entryway and the kitchen was on the right. A central hallway followed, with Guillermo's room on the right, Ernesto's on the left, and the main bathroom in the middle. There were also three bedrooms in the back, separated from the rest of the house by locked doors and a garage.

On April 17, 2006, Ernesto left for work around 2:00 p.m. and Guillermo left around 5:00 p.m. When Ernesto returned home, he noticed the front door and his bedroom door were open, and the door to Guillermo's room had been knocked down and damaged. Dresser drawers in both bedrooms were open. Ernesto went to the main bathroom, where the window was open and the screen was missing. The window was normally left open with the screen on at that time of the year.

Ernesto saw muddy footprints on the window sill and the counter by the bathroom window. The footprints were from a boot he estimated to be around a size nine to 10. A patio chair had been placed under the opened window outside the house. The window was five to six feet off the ground and the chair was about two feet tall.

Ernesto called Guillermo, who came home and inspected the house. Guillermo found the burglars had taken his mountain bike, a watch and some coins. Ernesto reported his BB gun was missing.

Guillermo found men's boot prints on the bathroom floor and the chair outside the house under the window. The window screen was set against the house on the grass outside. The door separating the back bedrooms from the rest of the house was locked and undisturbed. The window to one of the back bedrooms was open and there were footprints on the inside wall. Ernesto's car was outside this window.

Latent fingerprints were found on the right-hand corner of the bathroom window frame, and on a plastic container and a tin can found in the bedrooms. The latent print from the bathroom window was identified as defendant's.

The crime scene investigator who processed the house did not notice any footprints. It was his regular practice to lift any worthwhile footprints he saw.

Neither brother knew defendant not gave her permission to enter the house. The Delatorre brothers and their cousin first entered the house when a realtor showed it to them in May 2005. They were the only people in the house at the time. The brothers did not know the prior owners, having met them only when they purchased the house. After buying the house they cleaned it, which included washing the windows and their frames. The windows were occasionally cleaned after the initial cleaning.

DISCUSSION

I

Defendant contends there is insufficient evidence to support her burglary conviction, which she argues is supported only by the fingerprint evidence. We disagree.

In determining whether the evidence supports a conviction, we review "the whole record in the light most favorable to the judgment" and decide "whether it discloses substantial evidence . . . such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) The question, then, "'is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" [Citation.]" (*People v. Hatch* (2000) 22 Cal.4th 260, 272.)

Defendant relies on several cases finding fingerprint evidence insufficient to support a conviction. Each can be distinguished from her claim.

In *People v. Trevino* (1985) 39 Cal.3d 667, disapproved on other grounds in *People v. Johnson* (1989) 47 Cal.3d 1194, 1221, the defendant's thumbprint was found on a dresser drawer in the murder victim's bedroom. (*Trevino, supra*, 39 Cal.3d at p. 696.) However, since the defendant had been a guest in the victim's home prior to the killing, and because the age of the thumbprint could not be determined, the trier of fact could only "'speculate as to how and when the print was made.'" (*Id.* at p. 697; see *id.* at p. 696.)

Although it is possible the house might have been open to the public when it was on sale, there is no evidence defendant was ever in the home when it was for sale or invited there by the former owners. Even if she could have put her fingerprints on the window frame before the Delatorres bought it, they cleaned the windows and the frames after buying the house.

In *People v. Johnson* (1984) 158 Cal.App.3d 850 and *People v. Jenkins* (1979) 91 Cal.App.3d 579, the issue was whether the defendants' fingerprints on bottles and containers found in residences where they were or had been present was insufficient to show their "constructive possession" of the contents of the bottles. (*Johnson, supra*, 158 Cal.App.3d at pp. 854-856; *Jenkins, supra*, 91 Cal.App.3d at p. 584.) The issue here is not possession but identity--was defendant the person or one of the persons who broke into the house and took items--and the fingerprint is powerful evidence identifying defendant as one of the burglars.

Mikes v. Borg (9th Cir. 1991) 947 F.2d 353 is a federal habeas corpus action where the victim was found dead in the basement of his burglarized fix-it shop. (*Id.* at p. 355.) The murder weapon was one of several turnstile posts that were part of a disassembled turnstile not accessible to the general public in the shop. (*Id.* at pp. 355, 357-358.) The victim had purchased the turnstile from a hardware store holding a "going-out-of-business sale" and stored it in his basement. (*Id.* at pp. 355, 357.) Defendant's fingerprints appeared on two of the turnstile posts, one of which was the murder weapon; the prints

on that post included five "consecutive" prints, two of which were identified as belonging to defendant. (*Id.* at pp. 355-356.) The Ninth Circuit Court of Appeals concluded the fingerprints could have been left on the posts while the posts were in the publicly accessible store prior to the victim's purchasing them. (*Id.* at pp. 358-359.)

Borg is not binding authority on California courts. (*People v. Figueroa* (1992) 2 Cal.App.4th 1584, 1587.) It is also factually distinguishable from the instant case. Turnstiles are meant to be used by the public and thus are commonly found in public places, where they will be touched by the general public. Here, there is no evidence the house was open to the general public after it was sold to the Delatorre brothers and their cousin. And, once the house was purchased by the Delatorres, they cleaned it, which included washing the windows and their frames, and the windows were occasionally cleaned thereafter.

Nor is the guilty verdict inconsistent with *People v. Flores* (1943) 58 Cal.App.2d 764. *Flores* involved an auto theft conviction in which the defendant's fingerprint was found on the back of the car's rearview mirror. (*Flores, supra*, 58 Cal.App.2d at p. 766.) *Flores* testified that Robert Campos came to his house in the car on the night of the theft. *Flores* got into the car with Campos and sat in the passenger seat while Campos drove. (*Id.* at p. 767.) When Campos returned to *Flores's* house, he told *Flores* that the car was stolen. (*Ibid.*) *Flores* denied stealing the car and had no recollection of

touching the rearview mirror, although he admitted he could have done so. (*Id.* at pp. 767-768.) The Court of Appeal found the fingerprint evidence insufficient, as it established only the defendant's presence in the automobile, not that he stole it. (*Id.* at pp. 769-770.)

Flores is inapplicable to the instant case, as defendant never explained how her fingerprint was at the point of entry for the burglary. While a fingerprint did not establish intent to steal an automobile in *Flores*, it is ordinarily sufficient to prove guilt of burglary. "The California Supreme Court has repeatedly emphasized that fingerprints are the strongest evidence of identity and ordinarily are sufficient by themselves to identify the perpetrator of the crime." (*People v. Figueroa*, *supra*, 2 Cal.App.4th at p. 1588.) Typically, "evidence of a fingerprint, palm print, or footprint left inside a structure or at a point of unusual access is alone sufficient to support a burglary conviction. [Citations.]" (*People v. Bailes* (1982) 129 Cal.App.3d 265, 282.)

The open window with the removed screen, and the location of the footprints and patio chair near the open window, demonstrate one or more burglars entered the house through the bathroom window. Defendant's fingerprint was found on the frame of that window, an area not generally accessible to the public. She never claimed to have been in the house before the burglary,

and gave no explanation as to how the fingerprint got there.¹
This is sufficient to support her burglary conviction.

II

As one of the probation conditions, the court ordered defendant could not "be in places where narcotics and/or dangerous drugs are present." Defendant contends and the Attorney General concedes this violates due process because it lacks a knowledge requirement. We accept the concession.

In *In re Sheena K.* (2007) 40 Cal.4th 875, the California Supreme Court held a probation condition prohibiting the probationer from associating with anyone who was a member of a specified class of persons, without a requirement that the probationer know the person was a member of the class, is unconstitutionally vague (*id.* at pp. 890-892); because such conditions present a pure question of law, a probationer's failure to object to its imposition does not forfeit the issue for appeal (*id.* at pp. 888-889); and an acceptable remedy on appeal is for the appellate court to insert the knowledge requirement. (*Id.* at p. 892.)

The challenged portion of the probation condition imposed on defendant here relates to the places where she may not be, but we find the condition imposed is similar for constitutional

¹ Although the footprint, which was a size nine to 10 boot, is likely too large to be defendant's, this only indicates an accomplice and does not rebut the inference of guilt from her fingerprint.

purposes to that of *Sheena K.*, and we shall insert the knowledge requirement.

DISPOSITION

The probation condition prohibiting defendant from being "in places where dangerous drugs and/or narcotics are present" is modified to read that defendant not be "in places where defendant knows dangerous drugs and/or narcotics are present." As modified, the judgment is affirmed.

NICHOLSON, Acting P. J.

We concur:

HULL, J.

ROBIE, J.